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Supreme Court, U.S.
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No. 04-1194

IN THE

Supreme Court of the United States

CLARENCE HARLEY,

Petitioner,

v.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITION FOR REHEARING

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STATEMENT OF INTERVENING EVENTS

For the record, the petitioner submits additional relevant and controlling evidence in the form of current news articles and a press release from New York state comptroller, Allan Hevesi. The articles report on the "gross mismanagement" recurring in the kings county public administrator operations as well as the improprieties related to the surrogate judge and the attorney for the public administrator. These issues are of grave concern and have lead directly to public distrust in the judiciary residing in kings county.

ARGUMENT

The dismissal of the instant case before the Court was never about the law or the rules that governed the underlying issues in the case. The dismissal was more about a cover-up of unfair, unscrupulous and predatory practices within the king county's surrogate's court, kings county public administrator operations and the counsel to the public administrator.

The state auditors found problems with collection of the state property; failure to distribute monies to rightful heirs; inappropriate disbursements and failures to follow procedural guidelines. A press release indicated that prior reviews of the Public Administrator operations in 1987, 1992, and 1996 disclosed similar problems. (Appendix A, p 1a-2a). Consequently, these issues have been recurring and most likely, the estate of Russell Smith was caught up in the systemic problems during the Surrogate Bloom/Samuel Plotkin administration.

The kings county public administrator is entrusted with $57 million in assets and over 1000 open estate cases. These assets entrusted to the kings county administrator are, in light of the recurring mismanagement and lack of oversight controls, at risk to the corrosive and predatory practices identified

by the petitioner in his complaint and echoed by the state comptroller's audit.

Remarkably, the estate of Russell Smith transcended both the Surrogate Bloom/Samuel Plotkin and Surrogate Feinberg/ Marietta Small administrations. The petition disclosed that the estate was victimized by Smalls administration when she sold the Quoque property for $121,000 in August of 2000 when respondent Adler claimed that the property was transferred to the beneficiaries by deed in 1997.

The disposition of said funds are in question and conflicts with Small's statement in the New York Daily News article (Appendix B, p 4a) that it is unreasonable to conclude that estate assets are not being distributed to rightful beneficiaries.

The dismissal of the case denied the petitioner the opportunity to raise, inter alia, whether the mishandling of that property affected the petitioner's fees and/or whether the participating attorneys engaged in fraud, collusion and deceit. None of which was adjudicated in any prior proceeding.

In response to the clamor of corruption and improprieties chief judge, Judith Kaye, according to the New York Times article at Appendix D, p 6a-8a, appointed a special commission which recommended reforms for lawyers who handle estates of people who die without wills or heirs.

That is not the fix. It is not where the problem lies.

The problem lies when an aggrieved party is barred from commencing a subsequent action in civil court as a result of fiduciary improprieties or some other tort concerns during an estate administration.

Where and how does a party get relief after he/she has suffered financial loss as a result of mismanagement and/or predatory practices at the hands of the administrator or the administrator's attorney and/or both?

Typically, the accrual of a cause of action occurs long after the estate administrations have been finalized.

Why would the surrogate court be the place of venue for a lawsuit?

Instituting reforms for attorneys who handle estates for people who die is merely side-stepping the issues since the rules and regulations are already in place. Moreover, it is not just the attorneys. The flaw lies in the failure to deal with the systemic noncompliance within the judicial system.

The operating question is how has the corruption been able to sustain itself for so long?

The corruption has sustained itself through the issuance of discrepant decisions and the denial of considerations entitled to by plaintiff-parties during litigation.

The supreme court decision below is replete with discrepancies. In invoking res judicata in the instant case below Justice Ruchelsman writes, among other things, the following:

> "While the Surrogate decision awarding Plaintiff his fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order." (p 10a at Appendix D of original petition).

Commentary such as the foregoing are the type of discrepant statements that obscure the facts and the record and which have devastating effects on litigants. Neither does the record support the statement nor were allegations of fraud collusion or deceit raised in the application to suspend the letters of administration or raised in the application to validate the petitioner's fee as is reflected in the supplemental brief at S-App.11 and/or reflected within the petition for rehearing at Appendix E, p 9a-13a.

Res judicata is inapposite.

The respondents were allowed to evade the issues of the instant complaint at the appellate level, claiming that the fraud deceit and collusion revolved around respondent Adler's prior representation of Russell S. Smith. Thereafter, claiming

fraud and collusion were raised and adjudicated by the Surrogate (Appendix F, p 14a-15a) yet failed to prove that claim with evidentiary support.

The rules for invoking res judicata and the corollary doctrine collateral estoppel were consistently applied in *Garcia v Borelli* App 180 Cal.Rptr. 768. The California Court of Appeals, First District, held that Garcia found its content in an estate administration wherein the prior action related to the parties' entitlements under the will during probate proceedings, while the subsequent action involved the respondent attorney's negligence, inter alia, alleged misconduct in performing his duties as attorney for the executors of the estate.

The lower court ruled 'all damages claimed by plaintiffs in this action have already been adjudicated, ...' That constituted the courts ruling.

The California Court of Appeals reversed. The higher court found that just because the action involved the contents of the will as drafted, it did not seek further recovery from the estate of the Testator or from Wife. Nor did it seek to modify the settlement or judgment entered in the probate court proceedings.

Likewise, the case before the Court involved the content of an estate administration wherein the petitioner in an earlier action filed applications to have Samuel Plotkin's letters of administration revoked/suspended for, inter alia, alleged mismanagement of estate assets and another application to validate the petitioner's fees and reimbursements duly earned and due. The petitioner commenced the instant complaint 5 years later, charging the public administrator's attorneys with fraud and deceit and colluding with the other participating attorneys.

Most egregious is Justice Ruchelsman's discrepant commentary that . . . "a stipulation in open court whereby Adler agreed to withdraw his objections to the fees requested

and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment." (p 8a-9a at Appendix D of original petition).

When the record actually reflects:

> MR. ADLER: The parties have agreed as follows:
>
> That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim.
>
> The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to [206] remove the Public Administrator. (Appendix E, p 10a).

The cited commentary is ethically wrong and is exactly how corruption is orchestrated and sustained in kings county. One party covers for the other party so on and so on.

The lower court decision conflicts with the United States Court of Appeals decision in *Hernandez v City of Los Angeles* (624 F.2d 935 1980) on the issue of collateral estoppel. The burden of pleading and proving identity of issues rests on the party asserting collateral estoppel, and the party, to sustain such burden, must introduce record sufficient to reveal controlling facts and pinpoint the exact issues litigated in the prior action. Respondents failed to do this.

Before invoking the doctrine of collateral estoppel a determination of whether the party whom the doctrine is invoked had a full and fair opportunity to litigate the prior controversy must be made (Gramatan Home Investor Corp v Lopez 46 NY2d 481, 485) and (CRK Constr of Suffolk v Brown & Associates 260 AD2d 530). Both the cases were cited by the lower courts but neither the supreme court nor the appellate

court applied the comprehensive analysis to the instant case. The decisions are devoid of analysis.

The chief reason for the conflict in treatment of the case before the Court was to suppress the conduct of the public administrator and improprieties of the respondents. The conduct cannot continue. The removal of Surrogate Feinberg is a first step. However, the special commission appointed by chief judge Judith Kaye must address more.

CONCLUSION

The petition for writ of certiorari should be granted since the issues raised are current, relevant and of importance to the general public trust.

Respectfully submitted,

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CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.

APPENDICES

APPENDIX A

[Seal] NEWS

From the Office of the New York State Comptroller
Alan G. Hevesi

CONTACT: Press Office (518) 474-4015 FOR RELEASE: Immediately April 19, 2004

Audit Finds Kings County Public Administrator Non-compliant with Estate Administration Laws and Regulations

The Kings County Public Administrator does not always follow many rules and regulations when administering the estates of Brooklyn residents who die without heirs, according to an audit released today by State Comptroller Alan G. Hevesi.

Auditors found a range of problems including irregularities in the collection of estate property, inappropriate disbursement of estate expenses, inadequate documentation of legal fees charged to estates and insufficient compliance with rules regarding selection of vendors.

"The Public Administrator is entrusted with the responsibility to handle the affairs of deceased New Yorkers, and must be held to the highest standards of operations and accountability, " Hevesi said. "The Kings County Public Administrator is managing well over a thousand estates valued at more than $57 million, and must ensure that those assets are not unnecessarily diminished and that they are distributed to heirs in a timely manner."

Specific findings by auditors included the following:

- More than three years after the Public Administrator's staff found U.S. Savings Bonds and stock certificates valued at approximately $84,000 in a safe-deposit box of a deceased individual, these assets had not been converted to cash as required.

- The Administrator distributed another deceased individual's estate assets to beneficiaries but failed to credit $2,675 worth of jewelry from the estate. More than a year later, the jewelry still had not been converted to cash.
- While the Administrator is permitted to charge estates an administrative fee of up to two percent of gross assets, one estate had been overcharged by $2,860 for this fee.
- The Administrator used an advertising firm to place death announcements in local newspapers. As a result, a death announcement that would have cost $840 if purchased directly by the Administrator instead cost $1,698. Auditors found other similar instances, and determined that six estates could have been saved a total of $4,324.
- There had been no annual independent audits of the Administrator's office, as required by law.

County Public Administrators are empowered under the Surrogate's Court Procedure Act to administer the estates of residents who die with no known heirs, or with heirs or executors who are not qualified or willing to administer the estate. The Act also created the Administrative Board of the Office of the Public Administrators. This 13-member Board, which includes one member appointed by the State Comptroller, sets policy for Public Administrator activities.

Prior reviews of Public Administrator operations in 1987, 1992 and 1996 found similar problems.

APPENDIX B

Hevesi Rips Official's 'Will' Power

By Larry Cohler-Esses
New York Daily News
April 22, 2004

It's practically a crime if you die without a will in Brooklyn.

A new report found gross mismanagement at the office of the Kings County public administrator, which handles the roughly $57 million left behind by Brooklynites who make no provision for their estate.

State Controller Alan Hevesi released an audit this week that found public Administrator Marietta Small withheld money from rightful heirs, miscalculated estate taxes and commissions, made inappropriate disbursements and violated regulations governing fees for lawyers and vendors.

Hevesi's auditors, who examined 10 estates, found that in six, assets had not been collected or credited to the estates "even though [Small] had knowledge of such property."

In one case, Small withheld almost $90,000 in stocks and bonds when she distributed an estate's assets, Hevesi reports.

In another, Small took $4,500 from estate funds to buy memorial plaques at local synagogues for several deceased people though "there was no evidence that the decedent requested such a plaque."

Some of those individuals had been dead for years.

"The public administrator is entrusted with the responsibility to handle the affairs of deceased New Yorkers, and must be held to the highest standards of operations and accountability," said Hevesi. Hevesi's report echoes findings

in separate investigations by the Daily News and state Attorney General Eliot Spitzer.

Those probes found Small's legal counsel, Louis Rosenthal, had taken hundreds of thousands of dollars in exorbitant fees without documenting the work he had done.

The state Commission on Judicial Conduct has charged Kings County Surrogate Michael Feinberg with misconduct for approving these fees.

Small responded it was "not reasonable to conclude that estate assets are not being distributed to rightful beneficiaries" based on Hevesi's limited sampling of cases.

The public administrator's office is an arm of Surrogate Court. Feinberg named Small to her $75,000 job in 1997.

APPENDIX C

Scandal-plagued Brooklyn Judge Benched

Zach Haberman
New York Post
February 23, 2005

Brooklyn Judge Michael Feinberg was ordered off the bench yesterday by the state's highest court.

The Surrogate Court judge, long accused of rewarding political pals with lucrative court appointments, was suspended by the Court of Appeals.

The judges said the suspension will be in effect pending "disposition of his request for review . . . by the state's Commission on Judicial Conduct."

Feinberg had appointed a lawyer named Louis Rosenthal guardian of estates of several people who died without leaving wills.

The 61-year-old judge is accused of allowing Rosenthal to collect $2 million more from the estates that he was entitled to.

Rosenthal was permited by law to award himself up to 6 percent of an estate, but Feinberg allegedly would allow him to take up to 8 percent.

APPENDIX D

State Commission Seeking
Ouster of Surrogate Judge in Brooklyn

By Leslie Eaton
New York Times
February 15, 2005

In the latest development in Brooklyn's long-running judicial scandals, the State Commission on Judicial Conduct announced yesterday that it was seeking the removal of the Kings County surrogate judge, contending that he improperly awarded millions of dollars in fees to a longtime friend.

The commission found that the judge, Michael H. Feinberg, appointed a neighborhood friend and law school classmate, Louis R. Rosenthal, to handle the legal matters of people who died without wills, He then rubber-stamped Mr. Rosenthal's fee requests of $9 million, including $2 million that the commission called "excessive."

Judge Feinberg will ask the state's highest court, the Court of Appeals, to review the commission's decision, said his lawyer, Harvey L. Greenberg, who declined to comment further. Mr. Rosenthal did not respond to telephone calls made to his office.

The commission did not find that the judge had received money from Mr. Rosenthal, although as an ethics commission it does not conduct criminal investigations, its executive director, Robert H. Tembeckjian, said. He would not comment further on the substance of the case, citing the Court of Appeals review.

The court could decide as early as the end of the week whether to suspend the judge pending its review, as it has done frequently when the commission calls for someone's removal from the bench. A decision on whether to remove

him permanently is unlikely before September, said Gary Spencer, a spokesman for the court.

Surrogates' courts are a somewhat obscure branch of the judicial system that handle wills and estates, a branch that has become infamous because of some judges' clubby habits of awarding huge fees to politically connected lawyers.

The possibilities for patronage have helped make the surrogates' elections important to political parties, if not to voters. With support from Mr. Rosenthal, Judge Feinberg was elected in 1996 after a bitter Democratic primary battle in which the contestants spent $1 million, a battle that solidified the power of his chief backer, Clarence Norman Jr., the Brooklyn party leader.

The party's control over judicial positions in Brooklyn has come under scrutiny because of a series of scandals over judges it has backed. In recent years, one State Supreme Court justice there has been sentenced to prison for taking a bribe, another was removed from the bench for financial improprieties, and a third, Gerald P. Garson, has been charged with receiving bribes in divorce cases; he has pleaded not guilty.

The Brooklyn Surrogate's Court has been the focus of investigative articles by The Daily News and has been investigated by the state comptroller, Alan G. Hevesi, and by the attorney general, Eliot Spitzer, whose investigation is continuing, according to a spokeswoman.

A special commission appointed by the state's chief judge, Judith S. Kaye, recommended a number of reforms last week dealing in particular with the lawyers hired to handle the estates of people who die without wills or heirs, a position known as the counsel to the public administrator.

That is the position held by Mr. Rosenthal, who like Judge Feinberg had been active in the Democratic Party and has

also served as a judge, though he is now in private practice. According to the commission's decision, his father was the public administrator in Brooklyn from 1958 to 1964, though only about 5 percent of his own legal practice concerned surrogates litigation.

Judge Feinberg appointed Mr. Rosenthal shortly after he became surrogate, and began to award him legal fees for handling estates without requiring documentation about the time and effort he put in. The judge also routinely approved legal fees equal to 8 percent of the value of the estate in question, despite the fact that fees are supposed to be limited to 6 percent except in exceptional circumstances.

APPENDIX E

Excerpt from Surrogate's Court Hearing
January 18, 1995

[204] THE COURT: Good morning.

ALL PRESENT: Good morning.

THE COURT: I want one thing understood. No more conferences between the parties in this matter. I don't want it settled. Under no circumstances do I want to settled. And I have been admonished by the Appellate Division to fine each side a sum of $10,000.00 in this case. I will hold it in abeyance, but I intend to fine each party the sum of $10,000.00. And then I will assign another judge to hear the hearing on the fine. Just so we understand one another.

Let's proceed. Do you have all the appearances?

MR. NOCERA: Yes.

THE COURT: Okay, open up.

MR. ADLER: Perhaps we should place on the record, if I might, your Honor, the one area of this proceeding which we have agreed upon, and that is the claim of Mr.—

THE COURT: I don't even want to hear about what you agreed upon. I want it all tried.

MR. ADLER: Except that all of the parties, your Honor, have agreed to one issue that [205] we resolved. There's no need to try that issue, your Honor. There's a claim here filed by the accountant which all the parties have agreed to submit to you for determination based upon the quantity of—

THE COURT: Is that the fellow that's requesting $15,000.00?

MR. ADLER: That's correct, your Honor. And the parties have agreed as follows:

> Mr. Harley, Clarence Harley, the claimant in both the estates of—I'm sorry, claimant in the proceedings brought by both Joseph Smith and Russell Smith has filed a claim in a sum of $15,000.00 for services rendered to the estate as an accountant. The parties have agreed as follows:
>
> That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim.
>
> The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to [206] remove the Public Administrator.

THE COURT: He what?

MR. ADLER: There is pending before this Court two petitions. One petition by Mr. Harley seeks to have his fee fixed, which is really basically very similar, if not exactly the same issue, that's now before the Court with regard to the accounting proceedings. He has also made an application as a creditor to remove the Public Administrator as—

THE COURT: On what grounds?

MR. ADLER: There are several grounds listed, but the point of the matter is, your Honor, that—

THE COURT: Is this because of a prior conference of some type?

MR. ADLER: The point is that the parties have agreed that it's unnecessary since the Public Administrator is not seeking to object to the fee request of Mr. Harley. To rehash that issue, I believe with all due respect, your Honor, is unnecessary, because the parties have gotten beyond that issue.

* * * *

[209] JOSEPH SMITH: Okay. I'm one of the distributees and one of the ex-co-administrators. My thing I had brought as a point of interest to the Surrogates Court was the fact that Mr. Adler had previously defended my brother concerning this very same estate. At the point of his being chosen to represent the [public administrator], I brought that up again [210] and he has still proceeded to be the attorney. There is a definite blatant conflict of interest here.

MR. ADLER: Your Honor, if I might be heard. Mr. Smith has raised—

JOSEPH SMITH: I have paperwork on that.

MR. ADLER: Mr. Smith has raised this issue several times.

THE COURT: I read it all in here.

MR. ADLER: And the Court basically has—as I understand it, I don't want to rehash all of this.

THE COURT: Is this the one where you had a conference of some type?

MR. ADLER: What happened, your Honor, is, and it's only because my memory has been refreshed from the original instance because I did not remember it, but as best as I can recall, what happened very simply is about five or six years ago, Mr. Russell Smith came to the Public Administrator's—came to our office asking that the Public Administrator be appointed the administrator of his [Uncle's] estate, notwithstanding that he and his brother Joseph [211] Smith were co-administrators. He told me that they couldn't get along. They were having a problem. Is there something the Public Administrator could do.

What I did, as best as I can recollect and reconstruct, is I called your former law secretary, George Mack, and asked him if we could conference the matter, okay. And he said yes. And I told Mr. Smith that the matter would be conferenced,

and a few days before Mr. Mack, and I told him that I would advise the parties accordingly.

What happened after that is that—first of all, I didn't retain—I mean, I wasn't retained by Mr. Smith, Russell Smith. He didn't retain me. I didn't ask to be retained. He was proceeding to have the Public Administrator appointed, and as attorney for the Public Administrator I happened to be the one he spoke to.

I didn't get any information about the estate from Russell Smith. He didn't give me anything relevant with regard to it, other than the fact that he was having a dispute with his brother and he thought that it couldn't be worked out [212] without the appointment of the Public Administrator.

Well, the next day or perhaps the day after, I received a call from Mr. Smith, Russell Smith, telling me that he had worked out his problems with his brother and there was no need for the conference. And I said, fine. I wrote him a letter telling him that we wouldn't proceed on his behalf. And that was, in all respects, the end of the matter.

Now, they—Mr. Joseph Smith, has raised this issue a couple of times. Your Honor, I think it's really—I don't think I should waste the Court's time anymore with regard to this issue. There are much more complicated issues before this Court. I can only tell you, your Honor, that in proceeding on behalf of the Public Administrator, I have filed as many, if not more, objections to the accounting of Russell Smith than I have with regard to the estate of—the accounting of Joseph Smith.

The Public Administrator's position isn't tainted in any way based upon a five-minute conversation that I had with Russell Smith five or [213] six years ago. And the truth of the matter is, your Honor, I state it in open court, when they first told me about this a year ago, I had absolutely no recollection of ever having met Russell Smith. However, based upon a

reconstruction of some of the letters that went back and forth, I do recall the situation exactly as I've repeated it to you.

But with all due respect, your Honor, I think that this issue is being raised now as a desperate, a desperate attempt to cloud what really is before this Court, and that is the accounting of Joseph Smith and the accounting of Russell Smith.

APPENDIX F

RESPONDENT'S BRIEF
NY SUPREME COURT
APPELLATE DIVISION
2ND DEPARTMENT

* * *

A review of Harley's claims in the Supreme Court action reveals that all of the allegations of professional misconduct, fraud, deceit and collusion revolve around Adler's purported confiict of interest due to his prior dealings with Russell S. Smith (RA 23, ¶ 14).

* * *

Harley's complaint also alleges that Hesterberg & Keller's exercise of authority was wrongful and prevented Harley from obtaining his full fee claim (RA 25. ¶ 28). Harley fails to acknowledge that the Surrogate extended his deadline for filing supporting documentation on no less then two occasions (RA 61). His assertion that he was never made aware of the Court's request (RA 33, ¶¶ 75-80) is belied by the Court order which states that [on] January 18, 1995, [Harley] requested and received 30 days within which to supplement his application in any manner he wished. When it appeared that [Harley] was unable to meet this submission deadline, the court enlarged it to June 10, 1995" (RA 61). It was Harley's own failure to submit the appropriate documentation to the Surrogate that caused the reduction in fees and not any acts by Adler.

* * *

However, much like Harley's failure to support his claims in Surrogate's Court, Harley failed to produce any evidence whatsoever to support his claims herein. Harley's claims have already been litigated in the Surrogate's Court. Any claims of fraud, deceit and collusion should have been raised in the

Surrogate's Court action and were raised in those proceedings. Accordingly, Harley's claims had been previously adjudicated and were found to have been lacking in merit and were barred by res judicata and collateral estoppel by the Court's prior order in the Surrogate's proceeding.